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SUPREME COUR

No. 198. October Term, 1904.

IN THE

Supreme Court of the United States.

THE RIVERDALE COTTON MILLS,
Petitioner,

v.

THE ALABAMA AND GEORGIA MANUFACTURING COMPANY
AND
THE HUGULEY MANUFACTURING COMPANY,
Respondents.

On writ of Certiorari to the United States Circuit Court of Appeals for Fifth Circuit.

Opinion of Supreme Court rendered May 8, 1905.

Petition for Rehearing and for Modification of Directions as to Decree.

JOHN T. MORGAN,
MARION ERWIN,
JOHN M. CHILTON,
WILLIAM S. THORINGTON,
ROBERT P. SHICK,
Counsel for Respondents.

International of Chamber Bldg.

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PETITION FOR REHEARING AND FOR MODIFICATION OF DIRECTIONS AS TO DECREE.

To the Honorable the Judges of the Supreme Court of the United States:

The respondents, the Alabama & Georgia Manufacturing Company and the Huguley Manufacturing Company, in the above stated cause, respectfully ask for a rehearing in said cause, especially for the purpose of obtaining a hearing on the propriety of a modification of the directions in the opinion of the court, confirming in full the decree of the Circuit Court of the Northern District of Georgia, of September 29, 1902, rendered on the ancillary bill, and in support thereof set forth the reasons therefor.

In its opinion this Honorable Court has dealt with but *one* phaze of the case *only*, viz.: whether the Circuit Court for the Northern District of Georgia had jurisdiction, in the Robinson suit, of the Alabama & Georgia Manufacturing Company, and the Huguley Manufacturing Company (the Alabama corporations), and whether the said Circuit Court had jurisdiction, by ancillary bill, to restrain them from prosecution of the suit commenced by them in the State Court of Alabama, and reached a conclusion in the affirmative on both those questions.

Assuming that to be true, and treating that as determining the whole case, this Court, in its opinion, did not examine into the terms of the decree of September 29, 1902, to see that it was in accordance with the equities and rights of the parties in the then, and present status of the case before that court, but directed a confirmation of the said decree.

We respectfully submit that the record discloses *substantial* rights in the respondents, which should be protected by this court in its directions to the courts below, conceding all that has been ruled in regard to the *jurisdiction* of the Circuit Court over them in the Robinson suit and on the ancillary bill, and the propriety of enjoining the Alabama suit.

It is true that the majority of the Judges of the Circuit Court of Appeals based their direction for a dismissal of the ancillary bill upon their view that the pleadings (the case being heard on bill and answer) showed that the *Alabama* corporations were *not* parties to the Robinson suit. But they also made a material finding of *fact*, which, it is respectfully submitted, is borne out and established by all the evidence and pleadings, and which as a question of fact is not controverted by any one. That court held that in the Robinson suit, the Circuit Court for the Northern District of Georgia "had never made any *effectual* decree conveying title out of the Alabama & Georgia Manufacturing Company, or the Huguley Manufacturing Company, even *if* it had jurisdiction

of them in the Robinson suit" (Opinion C. C. of Appeals, Record p. 560).

The only claim of title set up by the Riverdale Cotton Mills is the claim made by it in the ancillary bill, that it received a deed for said lands in controversy *from the commissioner* appointed to sell said lands and make deed to the purchaser, by the Circuit Court of the United States for the Northern District of Georgia, and that it had paid the purchase price under the confirmation decree of October 15, 1898. (Record, p. 477).

The provisions of the decree of October 15, 1898, referred to, are :

> "And it is ordered and decreed that the purchaser do pay into the court *within forty days* from this date the whole of the balance of the purchase money of said property, etc., * * * and that *upon the certificate of the Clerk* of the fact of such payment, *thereupon* the commissioner, S. C. Dunlap, Esq., *do execute and deliver* to said purchaser or such person as he may designate, *a deed* to the property sold," etc. (Record, pp. 446-7).

There is nothing in the record of the Robinson suit to show that the purchaser ever performed the conditions; no deed or copy of the deed from the Commissioner is in the record, and the claim of the Riverdale Cotton Mills rests wholly upon the averment in the ancillary bill to the effect that at some unknown time subsequent to said decree, it paid the purchase money, and it received a deed to the lands sold, including the lands and property in Alabama, from the Commissioner appointed in Georgia, by a Georgia Court, to make such sale and conveyance.

The exact allegation of the ancillary bill on this point is :

> "that in pursuance of the order of October 15, 1898, 'a deed was executed by direction of the said L. Lanier, by the *commissioner* of said court appointed to conduct the said sale, conveying the title to all the said property to your orator, and your orator paid all the

purchase money therefor into court, as required by order thereof.'"

(Record, p. 477.)

The record of the Robinson suit is before this Court. It is not disputeed that it fully shows that *there was never any decree or order in the Robinson suit, directing the mortgagor, the Alabama & Georgia Manufacturing Company, or the Huguley Manufacturing Company, or the trustees under the original mortgage, to make a deed conveying title to the purchaser, and there is no claim that they ever did.*

It is substantially stated in the original mortgage sued on in the Robinson suit (Record p. 4), that the factory plant and village were located and the lands lying within Chambers county, Alabama, although the mortgage erroneously described certain islands in the Chattahoochee river as lying in Harris county, Georgia.

The answer to the ancillary bill (and the case was heard on bill and answer), avers that the property is *all* in the State of Alabama, and makes it clear that certainly the factory and main part of the land lay in Alabama, (Record p. 507-8). The ancillary bill itself admits that the part of the property so described in the mortgage lay in Alabama, (Record p. 479).

Giving full effect, therefore, to all this Court has said in regard to the *jurisdiction* of the Court in Georgia, having jurisdiction of the *person, to decree* a foreclosure of a mortgage on lands in Alabama, under its ruling in the case of Muller *v.* Dows, 94 U. S., 444, the question is, what is the *legal effect on the title* to the lands in Alabama, and on the mortgagor's *right of redemption*, of a decree of the Georgia Court, in which it has not attempted t o exercise its jurisdiction in the way pointed out in Muller *v.* Dows. In that case, the question was whether the decree of the Court to foreclose and sell was void. The Court held it was not, because the lower Court *had directed the mortgagor to convey and the Court still had power to direct the trustees* under the mortgage *to convey* title to the purchaser. The Court did *not* hold, in that case, that the *decree itself* operated to convey title or to cut off the equity of redemption.

In the case at bar, the question is not whether the decree of the Circuit Court is void, but conceding it to be valid so far as it goes, as a decree of foreclosure and sale, whether it operates *in itself*, or through the Georgia *commissioner's* deed, to convey title to the lands in Alabama, and cut off the equity of redemption? And if the equity of redemption was not cut off, should not the decree of September 29, 1902, on the ancillary bill, which, *perpetually enjoins* the mortgagor, the Alabama & Georgia Manufacturing Company, and the Huguley Manufacturing Company, *from suing* for redemption in *any court*, be *modified* so as to allow them to set up any right of redemption they may have in the Circuit Court for the Northern District of Georgia, supplementary to the Robinson bill, and without prejudice to the right of the Riverdale Company, by supplementary proceedings, to require the mortgagor and trustee to make conveyance? The confirmation of the decree of Sept. 29, 1902, perpetually enjoining the Alabama & Georgia Manufacturing Company and the the Huguley Manufacturing Company from maintaining any suit for redemption anywhere, can only proceed on the theory that the decree of foreclosure itself operates to cut off the equity of redemption. This court has held:

> "It is the deed made to the purchaser actually "transferring the title of the parties to the suit, that "terminates the mortgagor's equity of redemption."
>
> Chicago, etc., R. R. *v.* Fosdick, 106 U. S. 71.

Even after foreclosure and after a perfect deed made, conveying title to the purchaser, the Alabama statutes give the mortgagor *two years* within which to redeem.

The record does not disclose *when* the Riverdale Cotton Mills obtained the deed from the Commissioner under the Georgia decree, even if that were effective to convey title to the Alabama lands. We submit that, under the well settled decisions of this Court and of the said Circuit Court that neither the *decree itself* nor the *Commissioner's* deed under such decree, in the Georgia Court, could *effectually* convey title or cut off the mortgagor's equity of redemption to the lands and property in Alabama.

The Supreme Court of the United States, in Carpenter *v.* Strange, 141 U. S., 87-106; 35; 640-6, speaking through Mr. Chief Justice FULLER, held as follows:

> "The real estate was situated in Tennessee and governed by the law of its *situs*, and while by means of its power over the person of a party a court of equity may in a *proper* case compel him to act in relation to property not within its jurisdiction, *its decree does not operate directly upon the property nor affect the title.* * * * *The Court has no inherent power, by the mere force of its decree, to annul a deed, or to* establish a title." (Hart *v.* Sansom, 110 U. S., 151, 155, 28; 101, 103.)
>
> "Hence, although in cases of *trust*, of *contract*, and of *fraud*, the jurisdiction of a court of chancery may be sustained over the *person*,* * * yet it does not follow that such a decree is in itself necessarily *binding upon the courts of the State where the land is situated.*"
>
> "By its terms *no* provision whatever was made for its enforcement against Mrs. Strange in respect of the real estate. *No conveyance was directed*, nor was there any attempt in any way to exert control over her in view of the conclusion that the Court announced. *Direct action upon the real estate was certainly not within the power of the Court*, and as it did *not* order Mrs. Strange to take any action with reference to it, and she took *none*, *the courts of Tennessee were not obliged to surrender jurisdiction to the courts of New York over real estate in Tennessee, exclusively subject to its law and jurisdiction.*"

Carpenter *v.* Strange, 141 U. S., 87-106, citing;
Story Confl. Laws, Sec. 543;
Wharton Confl. Laws, Secs. 288,289;
Watkins *v.* Holman, 41 U. S., 16 Pet., 25 (10:873);
Northern Indiana R. Co. *v.* Michigan Cent. R. Co., 56 U. S., 15 How., 233 (14:674);
Davis *v.* Headly, 22 N. J. Eq., 115;
Miller *v.* Birdsong, 7 Baxt., 531;
Cooley *v.* Scarlett, 38 Ill., 316;
Gardner *v.* Ogden, 22 N. Y., 327.

To the same effect, see also :

Watts *v.* Waddle, 6 Peters, 389 ;
Mercantile Trust Co. *v.* Kanawha & O. Ry. Co., 39 Fed., 339 ;
Lynde *v.* Columbus, C. & I. Ry. Co., 57 Fed., 993 ;
Farmers' L. & T. Co. *v.* Postal Tel. Co., 55 Conn., 334, 11 Atl. Rep., 184 ;
Pittsburg & State Line Ry. Co. *v.* Rothschild, 26 Am. & Eng. Ry. Cases, p. 50 (Advanced Case, Penn., 1886).

And, following the well settled adjudications of this Honorable Court, as announced *in re* Carpenter *v.* Strange, 141 U. S., 87, *supra*, and kindred cases cited, the Circuit Court of Appeals for the Fifth Circuit, has consistently maintained the same uniformity of decisions of this Court and those on the Circuit, in its decision :

In re "Guarantee Trust & Safe Deposit Co. *v.* Delta & Pine Land Co. *et al.*, 104 Fed. 5. (Decided May 30, 1900.)

Without quoting the text of the opinion covering an exhaustive review of many of the authorities cited and quoted hereinabove, we extract the following :

> "And it may be said that 'a sale made by a *special master*, under the direction of a court of chancery, *is not* a sale made by either of the *parties* to the litigation or under his direction. The master is a representative of the *court*, as a marshal or sheriff is in an action at law. He is not under the control of either party. He is not the agent of either to make the sales. (Mining Co. *v.* Mason, 145 U. S. 361, 362.) It will thus be seen that the decree in Blackburn *v.* Railroad Co. (C. C.), 3 Fed. 689,) did not operate directly upon the trustees or the railroad company, by requiring conveyances to be made by *them*, but partaking of the nature of a proceeding *in rem*, it acted immediately upon the *property*, and was to be executed through the instrumentality of independent

officers appointed by the court. A writ of assistance, issued by the court in Tennessee to put the purchaser at the sale made by the master in possession of the property, *would be wholly inoperative, because such process could have no extra-territorial effect.*" (Citing):

> Toland *v.* Sprague, 12 Pet. 300; 9 L. ed. 1093;
> Picquet *v.* Swan, 5 Mason, 40 Fed. Cas. No. 11,134;
> *Ex parte Graham*, 3 Wash. C. C. 456; Fed. Cas. 5,667;
>
> and other cases cited."

"Notwithstanding the want of power in a court of one State to deliver by its process the possession of land in another it is nevertheless a recognized and accepted doctrine that a court of equity, sitting in a State and having jurisdiction of the *person*, may decree a conveyance *by him* of land in another State, and may enforce the decree by process against the defendant."

> *Muller v. Dows*, 94 U. S. 449,24 L. ed. 207;
> Massie *v.* Watts, 6 Cranch, 148,3 L. ed. 181, etc.

"Where, however, it is sought by the *decree* to effect a transfer of the title to land lying within another jurisdiction, by directing its sale by a *Master*, who is *not* clothed with the title, the decree in such case operates upon the *thing*, and does *not* divest the title of the *Owner*; the master being, as we have seen, a mere representative of the court, not under the control of either party, nor the agent of either to make the sale. In the case last mentioned, the deed is simply *inoperative* to pass the title; for to judicially divest the title to real estate out of one person and place it in another, *the holder of the title* must be before the court, and the decree must operate upon the *person* by requiring *him* to make the conveyance.

"This principle is *elementary*, and should have special application to decrees rendered by the courts of one State authorizing the transfer of title to lands lying within the limits of another State." (104 Fed. p. 10.)

"*But*, it is claimed by counsel for the appellant, that *Muller* v. *Dows*, 94 U. S. 444, 24 L. ed. 207, has

overruled or modified the earlier cases decided by the Supreme Court.

"*In this view we are unable to concur.*

"The suit in that case was brought by the trustees named in the mortgage. The Chicago & Southwestern Railway Company was one of the defendants. A *part* of its railroad was in Missouri, and the mortgage which the bill sought to have foreclosed covered that part as well as the entire property covered by the mortgage, and directed the *Master*, who was ordered to make the sale, to execute a deed to the purchaser. *The Mortgagor was also directed to make a conveyance to the purchaser in further assurance.*"

"Upon appeal the decree was affirmed.

"It will be observed, that the railway extending into *two* States, was sold in its entirety; that the trustees were complainants in the suit seeking a sale of the property; and that the *Mortgagor* was required also to execute a deed to the purchaser. The Court seemed to lay stress upon the fact that the sale was made *at the instance of the trustees*, who notwithstanding the appeal, could also be directed by the trial court to *join in* a conveyance."

"In discussing the question, the Court (at p. 450, 94 U. S. and p. 209, 24 L. ed.), observed:

"'The *Mortgagors* here were within the jurisdiction of the Court. So were the Trustees of the mortgage. It was at the instance of the latter, the master was ordered to make the sale. The Court might have ordered the trustees to make it. The *Mortgagors*, who were foreclosed, were enjoined against claiming property after the master's sale, *and directed to make a deed in further assurance*, and the Court can direct the trustees to make a deed to the purchaser *in confirmation* of the sale. We cannot, therefore, declare void the decree which was made.'"

Thus, the Circuit Court of Appeals for the Fifth Circuit, after its exhaustive review of the uniform adjudications of this Court, distinctly and unanimously *declined to concur in* the contention of counsel in that case—and as urged by counsel

in this case—to the effect that the said *Muller* v. *Dows* case has "overruled or modified the earlier cases decided by the Supreme Court," but expressly held to the *contrary*.

Respecting the matter of "home precedents," or examples, it is noteworthy that, in framing the "form and terms" of the divers decrees of sale and of (conditional) confirmations, as entered by the Circuit Court in the case at bar, the *latter* appear to present the *only exception* or departure from the general rule established under the many and important adjudications heretofore had in the said court, both those preceding and those subsequent thereto.

In all railroad foreclosures recently had in the jurisdiction of the Circuit Court of the United States for the *Northern District of Georgia, ancillary* bills were filed in *every State* through which the road ran; decrees were taken on each of these ancillary bills, and *the mortgagor railroad companies were required to execute deeds*, as well as the Master Commissioner, and the purchaser was given the right to demand a deed from the *trustee* foreclosing the mortgage.

This was true in the Central Railroad foreclosure, Richmond and Danville foreclosure, Georgia Pacific foreclosure, Savannah and Western foreclosure, Marietta and North Georgia foreclosure, and Chattanooga, Rome and Columbus foreclosure, and notably in the case of the Eagle and Phenix Manufacturing Company foreclosure.

For a more complete review of all these and other precedents established by this and other Courts, and for the particular characteristics—differentiating the case of "Muller *v.* Dows" from the case at bar,—see our main briefs white cover, pp. 48–54, and blue cover, pp. 39–55.

We respectfully submit, that it is a well settled principle of law, that so long as the equity of redemption is not terminated, a purchaser or mortgagee in possession, who goes into possession, holds subject to be divested of his possession by a redemption; and that that may be accomplished, either by the mortgage debt being paid off, by accumulation of the

rents and profits by itself, or by that and additional money tendered by the mortgagor.

"Where redemption is allowed after a foreclosure sale, if the mortgagee purchases and enters into possession, he must account for the rents and profits."

Jones on Mortgages, Sec. 1118.

"If a mortgagee enters into possession under a defective foreclosure, he is in the position of a mortgagee in possession, and is entitled to the crops and other products of the land and is accountable for the rents and profits."

"An assignee stands in the place of his assignor in respect to the account, whether he be an assignee of the mortgage or of the equity of redemption."

Jones on Mortgages, Sec. 1119.

"After a mortgagee in possession has received payment of the debt, he really holds the property in trust for the mortgagor."

Jones on Mortgages, Sec. 1159.

"Under an illegal sale, an accounting is allowed in Alabama, on a bill for accounting and redemption."

Downs *v.* Hopkins, 65 Ala., 508.

"The remedy by the mortgagor is by bill in equity for an accounting and redemption."

Farris *v.* Houston, 78 Ala., 250.

"A mortgagee in possession by tenant or otherwise is accountable for the rent and bound to apply it to lessen the debt."

Kellogg *v.* Rockwell, 19 Conn. 446.

"Rents follow title, and the owner of the realty is the owner of the rent."

Wm. Grant, receiver, *v.* Buckner, 172 U. S. 237-8.

This entire contention on the part of the Respondents, which was raised in their 11th and 12th assignments of error on appeal from the decree of September 29, 1902, and which was ***sustained*** by the Circuit Court of Appeals, was passed over in the opinion of this Court, apparently because, al-

though covered by the briefs, the limit of time prevented much reference to it in the oral argument, which proceeded mainly on the questions of jurisdiction.

It is true that, in the statement of the case by Mr. Justice BREWER, in giving a summary of the ancillary bill, it is stated:

> "The bill sought to redeem the property described from the lien of the bonds and trust deed. On June 10th, 1901, this petitioner, a *corporation which had acquired all the title to the property described* in the trust deed passing under the foreclosure proceedings heinbefore refered to, filed in the Circuit Court for the Northern District of Georgia an ancillary bill to restrain the further prosecution of the suit in the State Court of Alabama. A temporary injunction was issued, which on final hearing was made perpetual."

It is respectfully submitted, however, that there is *absolutely no evidence or pleading* to justify the statement that the Riverdale Cotton Mills had acquired title or claimed to have acquired title to any of the Alabama lands, otherwise than through the deed claimed to have been received by it from the *Commissioner* under the *conditional* decree of October 15, 1898, in the Robinson suit; and that this statement of the court, which may be correct so far as any lands in Harris County, Georgia, may be concerned, is not correct in so far as the Alabama lands and property are concerned, if the operation of the principles heretofore laid down by this court, hereinbefore cited, control.

It is respectfully submitted, that in this preliminary statement of fact, this Court never intended to rule that, where the Circuit Court for the Northern District of Georgia did *not* decree conveyance from the mortgagor or trustee, but directed a *Commissioner* appointed by it to make conveyance, that such decree or such conveyance operates to convey title to lands in Alabama.

It is respectfully submitted, also, that the statement made by the Court above quoted, shows that the Court did not consider the fact that the decree of Sept. 29, 1902, did

not stop at enjoining the prosecution of any suit for redemption in the State Court of *Alabama*, or *other* court, but perpetually prevents respondents from even setting up such right to redeem even in the Circuit Court for the Northern District of *Georgia*.

In view of the premises, it is respectfully submitted, that the order affirming the decree of the Circuit Court, of Sept. 29, 1902, should be *modified* so as to allow the respondents, The Huguley Manufacturing Company and The Alabama and Georgia Manufacturing Company, to set up by appropriate proceeding, in the Robinson suit, in the Circuit Court for the Northern District of Georgia, any right or redemption, they or either of them may have, without prejudice to the right of the Riverdale Cotton Mills to file its supplementary proceedings to require the mortgagor or trustee to make a deed conveying title to the lands in Alabama to it, and that the said Circuit Court adjudicate the rights of the parties as they may appear.

Even the dissenting Judge (PARDEE), in his opinion in the Circuit Court of Appeals, recognized the necessity and right to supplementary proceedings in the Circuit Court, to correct the decree as it now stands. He said:

> "There are some *other questions* raised in the assignments of error, the proper determination of which might require the *reversal* of the decree below, and a *remand* for further proceedings, but as my brethren insist on a dismissal of the bill for want of jurisdiction, it is not necessary to consider them." (Record p. 564.)

These Respondents respectfully pray, therefore, that an order may be made granting them a Rehearing of the argument in this case on a date to be appointed by this Court at the present term, for the purpose of presenting their claim of right to a modification of the said decree as aforesaid, or as the equities of the case may require, and upon such points as the court may direct; the issuance of the mandate mean-

while to be withheld till further order of this Honorable Court.

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ROBERT P. SHICK,
Solicitors for Respondents.

I hereby certify that the foregoing application for rehearing is, in my opinion, based upon valid grounds, and I further certify that in my opinion, the decision of this Honorable Court, in this cause, is not in accordance with the law or with the facts as proven.

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